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CANADA'S REFUGEE STATUS DETERMINATION SYSTEM

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CANADA'S REFUGEE STATUS DETERMINATION SYSTEM

When Bill C-55 came into force on 1 January 1989, after receiving Royal Assent on 21 July 1988,(1) it radically altered the procedures for determining claims to Convention refugee status made within Canada. This paper will describe this legislation and indicate why it has been so controversial. The paper ends with an update of the legal challenge by the Canadian Council of Churches filed immediately after the start of the new system.

BACKGROUND(2)

Although Canada signed the Convention Relating to the Status of Refugees (and its Protocol) in 1969, procedures for determining claims to Convention refugee status made within Canada remained informal and discretionary until the Immigration Act, 1976 came into effect in 1978. At that time, the number of claims per year was low and the system then devised was administratively adequate for the job, although it was repeatedly criticized for its failure to give claimants an oral hearing. In the 1980s, however, the number of claims began to mount, partly in response to legitimate refugee pressures around the world and partly because it became generally known that the increasingly cumbersome system

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(1) S.C. 1988, c. 35, (Bill C-55).

(2) For a fuller discussion of the background to the bill, see The Convention Refugee Process in Canada: Its Reform, CIR 86-26E. Refugees also seek asylum in Canada by applying from outside Canada at consular facilities under special immigration rules. Some of the issues involved in this form of admission are discussed in CIR 80-10E. Both documents are available from the Research Branch, Library of Parliament.

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offered opportunities to come to Canada - and remain here for lengthy periods - that were not available through normal immigration channels. As the number of claims grew, from 3,450 in 1981, to 6,100 in 1983, to 25,000 in 1987, it became clear that the system as originally devised was no longer adequate. In April 1985, the Supreme Court of Canada declared unconstitutional an important part of the system, compounding the structural bottlenecks. The need for reform was clear and pressing.

Designers of the new system had to balance a number of factors. The new law had to embody the essence of the United Nations Convention Relating to the Status of Refugees, which requires signatory states not to return people in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion. At the same time, the law had to be stringent enough to counteract the perception (and to a very great degree, the reality) that Canada had lost control of her borders. Without a reassertion of control, the government feared that public support for all immigration and refugee programs might be endangered. Control of the numbers of claimants was operationally essential as well, given the great number of potential claimants worldwide. Thus, deterring the arrival in Canada of new claimants and very expeditious treatment of those who did come were important goals of the government. As the Commission reminded its employees just days before the new system actually took effect: "Prevention of arrival is as important as removal in reducing demand upon the refugee determination process." Yet control could not be achieved at the expense of the human rights of the individuals involved; in its 1985 decision, the Supreme Court of Canada had ruled that refugee claimants once in Canada were protected by the Canadian Charter of Rights and Freedoms.

Three major studies and a Parliamentary Committee report preceded the introduction of new legislation in the House of Commons in May 1987. The most comprehensive of these was Rabbi Gunther Plaut's Refugee Determination in Canada. Rabbi Plaut - indeed all commentators - called for reform of the system and stressed the importance of an oral hearing for claimants.

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The new law was controversial and required 14 months to pass both the House and the Senate. Amendments were made at three stages: by the Legislative Committee and at Report Stage in the House of Commons, and by the Senate. Despite the changes, the resulting bill pleased few of its critics, most of whom had argued for a much more open process and greater protection for claimants. Most controversial was the addition of access criteria to the new system, in contrast to the former system, which had allowed virtually everyone who wished to make a claim and to pursue it through various levels of adjudication. Immediately following the coming into force of the new provisions, the Canadian Council of Churches launched an action in the Federal Court requesting a declaration that most of the procedures introduced by Bill C-55 and by Bill C-84 (passed at the same time) are unconstitutional. It remains to be seen whether the Supreme Court of Canada will give the Council the right to challenge the new law in this sweeping manner.

THE IMMIGRATION AND REFUGEE BOARD

The legislation established a new body, the Immigration and Refugee Board, which replaced both the former Refugee Status Advisory Committee and the Immigration Appeal Board (IAB). The Board has two divisions. The Convention Refugee Determination Division hears refugee claims and its members sit with immigration adjudicators on the access questions described below. Up to 65 full-time permanent members can be appointed, with part-time members appointed as the workload requires. The Immigration Appeal Division, with up to 30 permanent members, took over the work of the IAB with the exception of its refugee redetermination jurisdiction. It therefore deals with family class sponsorship appeals; appeals of removal orders for permanent residents and Convention refugees; and appeals of denial of entry or landing to holders of valid visas.

The legislation also provides for the appointment of a Chairman of the Board and an Executive Director, both appointed by the Governor in Council, as are all Board members. The first appointees to these two positions were Mr. Gordon Fairweather and Mr. Peter Harder. The

head office of the Board is in Ottawa but its operations are decentralized.

ACCESS TO THE SYSTEM

A. General

The access (or screening) process takes place within the structure of an immigration inquiry, a hearing to determine whether or not a person is admissible to Canada.(3) Inquiries, held usually in camera, are presided over by adjudicators, employees of the Immigration Department who are independent as far as their decision-making is concerned. The adjudicator first asks all individuals who are the subject of an inquiry if they wish to make a claim to be a Convention refugee. If a claim is not made then, it cannot be asserted at any later point. If a claim is made, a member of the Refugee Division of the Immigration and Refugee Board joins the adjudicator. The adjudicator proceeds to examine the immigration issues and decide whether or not the person is admissible to Canada. Then, both the adjudicator and the Refugee Division member decide first, whether the person is eligible to enter the refugee determination system and, second, if the person is eligible, if there is a credible basis for the claim.

At this screening stage, reasons are required for decisions, but they need not be in writing. Both decision-makers must agree before rejecting a claim on the grounds of eligibility or credibility; that is, only one need pass the claim at each point for it to proceed. All individuals at the inquiry stage are assigned legal counsel at the Minister's expense and this counsel acts if claimants have no counsel of their choice

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(3) The legislation also permits people who are lawfully in Canada as visitors, or who possess a permit, to make a claim to be a Convention refugee. They are referred for a "hearing" rather than for an "inquiry." The procedures and criteria, however, are essentially the same except that no determination need be made regarding immigration status and the safe country provisions (should they become operational) do not apply to such claimants.

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or if their counsel is not ready to proceed at the time set for the inquiry. Proceedings at this stage are adversarial in nature, with full rights given to both the claimant and the Minister to present evidence, cross-examine witnesses and make representations.

B. Eligibility

Claimants will be denied access to the new system on the basis that they are not eligible if they:

- have been recognized as a Convention refugee by another country and have a valid travel document (an exception is made for those claiming persecution in that other country; they will be permitted to enter the system if their claim is credible);

- are new entrants and come from a country (other than their country of nationality or habitual residence) that has been prescribed by the Governor in Council as a country that complies with Article 33 of the Convention (that is, a country that does not return people directly or indirectly to the frontiers of countries where they fear persecution on the named grounds); the country on the list can be identified as being safe for all claimants or for specified classes of claimants only; the adjudicator and Refugee Division member may not declare anyone ineligible on this ground unless the laws or practices of the country provide that the person will be allowed to return or have the right to have the merits of the claim determined there (see Problems and Controversies for comments on these criteria); it is important to note that the system began on 1 January 1989 without a list in place; the safe country provisions are therefore not in effect;

- are making repeat claims without having been out of Canada for 90 days;

- have already been determined in Canada or by a visa officer abroad to be a Convention refugee;

- are security risks, criminals or war criminals; or

- have been issued a departure notice and have not left Canada or had left but have returned because no other country has given them permission to enter.

Note that the claimant's personal story of persecution is not relevant at the eligibility stage of the proceedings, except for Convention refugees claiming persecution in the country which had previously recognized them as refugees. Note also that a representative or agent of the United Nations High Commissioner for Refugees may be present

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at the access tribunal at the request of or with the permission of the claimant, if such attendance is not likely to impede the proceedings.

C. Credible Claims

Claimants who are eligible next have the credibility of their claims determined. The adjudicator and Refugee Division member decide if there is any credible or trustworthy evidence on which the Refugee Division might determine the claimant to be a Convention refugee. In addition to evidence adduced at the inquiry relating to the claimant's personal story, they are instructed to consider evidence regarding the human rights record of the country in which the claimant alleges persecution and the decisions on prior refugee claims of others from that country. Note that the legal test is a low one at this stage; any credible or trustworthy evidence will suffice.

Most claimants do not in fact have the credibility of their claims actually tested at the inquiry. If the Minister (through his or her representative) is of the opinion that a credible basis does exist and so informs the decision-makers, the claimant proceeds directly to the Refugee Board for a full hearing. Over 90% of cases are found credible at this stage, most on an uncontested basis by the Minister. Recent administrative changes have speeded up the process so that the uncontested cases are now dealt with on paper; this eliminates the need to bring together physically for the enquiry a significant number of individuals: the lawyer, the claimant, the translator, the adjudicator and the Board member.

D. Removals and Review Following Screening

Claimants found to be inadmissible to Canada and either ineligible or not credible in relation to their refugee claims are thereby denied access to the full refugee determination process, and the adjudicator issues a removal order. Claimants may apply to the Federal Court of Appeal for leave to apply for judicial review of both the removal order and the decision of the access tribunal, but have no right to remain in Canada pending a decision. All applications for leave to apply for review are normally decided by one judge, without personal appearance by the parties, although this may be requested for special reasons. There is no appeal from a denial of leave to apply for review.

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The grounds for judicial review are those set out in the Federal Court Act, but they are also the same as the grounds for appeal of decisions of the Refugee Division. They are that the Division or access tribunal:

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

Claimants who have not had legal counsel up to this point remain eligible at this stage for counsel paid for by the Minister. They have a minimum of 72 hours between the screening decision and removal, if they so request. The country to which a claimant can be removed will vary depending on the reason for the exclusion. For example, those whose claims lack a credible basis can be removed to their country of origin or any other country where they may be admissible. Those found ineligible on the basis of safe third country, if that provision were operable, could only be returned there. Convention refugees can be removed to the country which had been protecting them prior to their arrival in Canada, and so on.

THE REFUGEE HEARING

A. Referral to the Refugee Division

Claimants found to be eligible and credible are issued conditional removal orders (which become final only when all further proceedings are completed and the decision has been against the claimant) and are referred to the Refugee Division for a full hearing. The Refugee Division is directed to set, within 10 days of the completion of the access inquiry, a time for the commencement of the hearing, although the actual hearing may be delayed a number of months. As noted earlier, people who are legally in Canada may also make refugee claims. For those people, no

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removal orders are issued and there is no direction that the Refugee Division expeditiously set a time for the full hearing.

B. The Nature of the Hearing

The legislation directs that all proceedings before the Refugee Division shall be as informal and expeditious as is consistent with fair treatment. The Division is not bound by any legal or technical rules of evidence and may base a decision on evidence it considers credible and trustworthy in the circumstances of the case. The expertise of the Division is recognized by specific permission for it to take notice of any information or opinion within its specialized knowledge, provided that it first gives notice of such facts, information or opinion to the Minister and the claimant and offers an opportunity for them to respond.

Both the Minister and the claimant have the right to be represented at the proceedings by counsel or an agent, although claimants are not eligible at this stage for counsel paid for by the Minister. Proceedings are normally in camera but if a member of the public asks to attend, the adjudicator can grant permission if satisfied that the proceedings would not be impeded and that neither the claimant nor the claimant's family would be adversely affected. Any representative or agent of the United Nations High Commissioner for Refugees has a right to attend any proceedings of the Refugee Division as an observer.

The refugee hearing is intentionally less adversarial than the screening hearing. Although the Minister may present evidence, he or she may only cross-examine witnesses and make representations with regard to the exclusion and cessation clauses of the Convention, which the legislation incorporates into Canadian law for the first time (see below). In practice, a Minister's representative is rarely present. The process is furthered by an employee of the Board called a Refugee Hearing Officer, whose role is to help with the claim, including questioning claimants when necessary.

Two Refugee Division members hear and decide each claim, unless the claimant requests or consents to a quorum of one member. As at the screening stage, both members of the panel must agree before a claim

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can be rejected. Written reasons must be given for all refusals, and may be requested, by either the Minister or claimant, for any positive decisions.

In a recent attempt to speed up the processing of claims, increased use has been made of the provision permitting a quorum of one member. Board experience has been that some 60% of claimants come from only five countries: Iran, Sri Lanka, Somalia, El Salvador and Lebanon. Acceptance rates for applicants from these countries range between 82 and 94%. Instead of assembling a panel of two members for each of these cases, it is now the practice for the cases which appear likely to succeed to be directed to an expedited process involving only one Division member. Officials hope to be able to process 18,000 such cases a year.

C. The Decision and its Consequences

If the Refugee Division decides that a claimant is indeed a Convention refugee, the conditional removal order issued by the adjudicator at the initial inquiry is deemed never to have been made and the person is eligible to apply for permanent residence administratively. This procedure is a distinct improvement over the previous time-consuming process of being granted landed status by Order in Council. Certain refugees are ineligible for permanent residence. The most important of these are:

- those who have been recognized as Convention refugees in another country and would be allowed to return there (unless they have a credible basis for fearing persecution there);
- nationals or citizens of any country other than the one in which the person fears persecution;
- people who have permanently resided in another country (other than the country where they fear persecution) and who would be allowed to return to that country;
- refugees, or any members of their family in Canada, who are inadmissible for health reasons; and
- refugees, or any members of their family, who are criminals, security risks or war criminals.

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If the Refugee Division decides that a claimant is not a Convention refugee, it may also indicate that there was no credible basis for the claim. Although this provision does not appear to be used by the Division, the practical significance of that decision would be that the person could then be removed from the country after 72 hours. Thus, these claimants would be placed on the same footing as claimants found to have no credible basis by the access tribunal.

Claimants who are found not to be Convention refugees (but for whom there was no additional finding of a lack of credible basis for their claims) may appeal to the Federal Court of Appeal on the grounds described above (see Removals and Review Following Screening) and have the right to remain in the country pending the decision. They may also appeal to the Supreme Court of Canada, with the permission of that court.

D. Cessation and Vacation of Refugee Status

The Minister may apply to the Refugee Division for a determination that a person has ceased to be a Convention refugee. In making that determination, the Division will apply the criteria set out in section 2(2) of the Act:

> (a) the person voluntarily re-avails himself of the protection of the country of his nationality;
>
> (b) the person voluntarily re-acquires his nationality;
>
> (c) the person acquires a new nationality and enjoys the protection of the country of that new nationality;
>
> (d) the person voluntarily re-establishes himself in the country that he left, or outside of which he remained, by reason of fear of persecution; or
>
> (e) the reasons for the person's fear of persecution in the country that he left, or outside of which he remained, cease to exist.

There is an exception for people who establish compelling reasons arising out of their previous persecution for refusing to seek the protection of the county which persecuted them.

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The Minister may also make an application to the Division, with leave of the Chairman, to reconsider and vacate a determination that a person is a Convention refugee on the ground that the determination was obtained by fraudulent means or misrepresentation of any material fact, whether exercised or made by the refugee personally or by another. Even if it finds fraud or misrepresentation, however, the Division may reject the Minister's application if it decides that there was other sufficient evidence on which the determination was or could have been based.

Hearings by the Refugee Division to decide the above matters are fully adversarial in nature. Three members hear the application and in the case of a split decision that of the majority prevails. As at the hearing of claims in the first instance, written reasons are required if the decision is against the refugee, and may also be requested for a decision in the refugee's favour. The decision of the Refugee Division may be appealed to the Federal Court of Appeal on the same grounds as those described in the previous section.

HUMANITARIAN AND COMPASSIONATE CONSIDERATIONS

The legislation described above deals with people making claims to Convention refugee status. It is silent, as was the former law, with regard to criteria or procedures to deal with the significantly large group of people for whom there may well exist humanitarian or compassionate reasons for granting permission to remain in Canada, despite the fact that the individuals are not refugees in the Convention sense of the word.(4) For example, they may come from war-torn parts of the world; they may have close family in Canada; or they may come from countries which would seriously punish them for having left. Canada has traditionally been very generous to individuals in these types of situations.

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(4) Section 114(2) of the Immigration Act permits the Governor in Council to facilitate the admission of people by Order in Council for reasons of public policy or due to the existence of compassionate or humanitarian considerations.

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For those claimants who are found by the access tribunal not to have a credible basis for their claim, the manager of the local Canada Immigration Centre carries out a pre-removal review to determine if there are humanitarian aspects of the case. For those claimants who are found to be credible but whose claims are ultimately rejected by the Refugee Division, there is a centralized pre-removal review conducted by Case Management Branch in Ottawa. The criteria for both kinds of pre-removal review are the same and their general purpose "is to ensure that we do not remove persons who would, because of their personal circumstances, face unduly harsh or inhumane treatment in their country of origin should they be removed" (emphasis in original). One further aspect of the humanitarian and compassionate policy worth noting is that some removal orders will be suspended temporarily in cases of natural disasters, civil strife, or political troubles in a person's homeland.

Direct appeals to the Minister have also been successful in some cases where a person rejected at either of the two stages of the determination system appears to be at considerable personal risk if returned to his or her country of origin. Two Canadian groups, Amnesty International and a coalition of groups called Vigil, are ready to help claimants try to obtain Minister's Permits on humanitarian and compassionate grounds. By concentrating on a small number of deserving cases, these groups have been able to achieve a considerable degree of success. In effect, they form a kind of informal back-up system should the formal administrative and legislative systems fail to provide protection in individual cases.

THE SAFE COUNTRY CONCEPT

An aspect of the legislation which was extremely controversial prior to passage, and which might affect the most claimants should it become operational in the future, is the eligibility criterion relating to the prescribed safe country list. The concept of returning to other countries people who quite admittedly could be genuine refugees rests on the premise that Canada need protect only those who have no other safe

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haven. It also assumes that Canada is not the only country which can and does protect refugees. Its presence in the legislation was intended to deter claimants from "asylum shopping"; that is, coming to Canada from a situation of safety as a matter of personal choice. For example, employment prospects might be thought to be better in Canada; family members might reside here; the prospects of acceptance as a refugee might be thought better in this country and so on. The government insisted that these kinds of matters relate to immigration, not refugee protection.

Operational realities, however, may make it ultimately very difficult to return anyone under the safe country provisions. A primary obstacle is the fact that in international law there is nothing to compel any of the countries on any list that Cabinet might prescribe to accept the return of most of these claimants, absent their agreement to do so. Canada has tried and apparently failed to achieve such agreements, or at least any agreements that would provide the safeguards required by our law.

The new law attempts to deal with this problem of "returnability." If there were a safe country list prescribed, the decision-makers at the access hearing would decide that a claimant was not eligible if:

> ... the claimant came to Canada from a country, other than the country of the claimant's nationality or, where the claimant has no country of nationality, the country of the claimant's habitual residence.
>
> (i) that has been prescribed as a country that complies with Article 33 of the Convention either universally or with respect to persons of a specified class of persons of which the claimant is a member, and
>
> (ii) whose laws or practices provide that all claimants or claimants of a particular class of persons of which the claimant is a member would be allowed to return to that country, if removed from Canada, or would have the right to have the merits of their claims determined in that country.

The distinction between theory and practice can be seen in the above provision. Implicit in its very structure is the fact that the mere presence of a country on the list does not guarantee a refugee's returnability to it, or the right to have a claim decided there. The

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theory of "safe countries" would be the basis of the Cabinet list described in (i). But in practice, returnability depends on the requirement in (ii), that the access tribunal be satisfied that the claimant is returnable. However, the legislation requires that the decision be based on the laws and practices of the listed countries. Thus the decision is to be taken at a level of abstraction largely unrelated to the circumstances of the individual claimant, in the sense that no personal contact needs to have taken place between officials in Canada and the other country regarding the situation of the actual person who is to be returned. The decision by the government to word the legislation so that such determinations are not to be taken on a case-by-case basis appears to have resulted from the desire for the access tribunal to proceed quickly, partly because such speed would increase the deterrent value of the new legislation and partly because any inclination of other states to accept returnees would be likely to diminish as time passed.

The issue of returnability thus poses major problems, but the legislation could not have ignored the question. Most of the countries to which Canada would be returning claimants have third country policies of their own and might immediately send returnees onward again. Yet for Canada to return claimants with no knowledge of their ultimate destination would likely violate the guarantee in the Charter relating to life, liberty and security of the person.

In the face of these facts, it remains to be seen how the decision-makers at the access stage would apply the safe country provision, should a list of such countries ever be prescribed. Many questions will arise in that event. What evidence of returnability or the right to make a refugee claim will be possible and acceptable to the tribunal and ultimately to the courts? In the absence of an assurance regarding returnability from the foreign government (whose decision it is) should the tribunal rely on affidavit opinions from non-governmental sources in that country? How could the decision-makers avoid, as a practical matter, looking at the situation of the individual claimant, despite the wording of the provision? Since the system is decentralized, how could the numerous access tribunals avoid rendering differing decisions relating to the same

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country on the list? Would these tribunals be able to assess the complex laws and practices of foreign jurisdictions and render the speedy decisions that are desired by the government? In the end result, it might prove practically and legally impossible to avoid an individual determination of the safety of people who are to be returned to safe countries.

Given that the safe country concept had been so central to the bill, and defended vigorously by the government, the fact that the system came into force without a safe country list may seem surprising. In reality, it reflects the very serious political difficulty that the list presented to Cabinet, particularly in regard to the United States. To have put that country on the list as safe without an exception for claimants from certain Central American countries would have been to fly in the face of common knowledge and experience. Yet making such an exception appears to be a step that Cabinet has not been politically prepared to take to date. Whether it might happen in the future will likely depend on events in the United States as well as our experience with the system. The steadily increasing number of claimants may bode ill for those who remain adamantly opposed to the provision.

OPERATION OF THE REFUGEE DIVISION: THE FIRST 18 MONTHS

The first 18 months of operation have seen a very high rate of acceptance of refugee claims. The major reason for this is that the safe third country provision is not operational. As a result, a very low percentage of claimants are being rejected as ineligible at the access stage rather than the 40% of claimants projected by the designers of the system. Further, the combination of the imposition of visitor visas on certain countries which were producing significant numbers of unfounded refugee claims and the deterrent effect of the new system itself resulted in far fewer manifestly unfounded claims than in preceding years. As a result, only some 7% of claimants have been rejected at the access stage of the new system on the ground that their claims lacked a credible basis, rather than the 33% the systems was designed for. Thus a Board given

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resources for approximately 7,200 full hearings per year found itself faced with a much heavier workload: of the 13,537 claims initiated in 1989, just under 11,800 were passed through for a full hearing. Only 5,306 final decisions were rendered in that same period. In the next six months (to 30 June 1990) another 10,982 claims were received, with the Board completing an average of 1,100 hearings per month. This pace resulted in a case pending load of 10,800 as of that date, almost 10 months' work. Meanwhile, the total number of claims made in 1990 is expected to be between 30,000 and 40,000.

The response of the Board to the large number of claims has been to implement administrative changes in an effort to speed processing times, and also to request increased resources from Treasury Board. In August 1990, Mr. Fairweather, Chairman of the Board, was able to announce that his budget had been increased by $18 million (from $62 million to $80 million), enabling 46 new board members to be appointed and 129 more staff to be hired. The additional resources will be assigned primarily to Toronto, where the backlogs are the most significant.

CHALLENGE BY THE CANADIAN COUNCIL OF CHURCHES

As mentioned, the new refugee determination system was strongly criticized prior to its passage by Parliament. Immediately after the legislation came into force, the Canadian Council of Churches launched a comprehensive constitutional challenge to the new law, alleging numerous violations of the Canadian Charter of Rights and Freedoms. Over 25 specific infringements are argued, including denial of a person's right to counsel, arbitrary detention, unfair appeal procedures, deportation under circumstances that violate the right to security of the person, flawed landing criteria, and so on.

The government responded by challenging the right of the Council to bring such an action, but on 26 April 1989, the Federal Court, Trial Division, held that the case could proceed. The government appealed that decision and was largely successful before the Federal Court of Appeal. In a decision released in March 1990, the court held that the

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bulk of the claim could not proceed, primarily because there would be individual claimants who could bring forward the issues on their own. The Council was given permission to proceed on only four issues. The Council then applied to the Supreme Court for leave to appeal but no decision has yet been rendered.